



EUROPEAN COMMISSION  
IMPACT ASSESSMENT BOARD

Brussels, 29 JAN. 2010  
D(2010)

## Opinion

### Title

**DG COMP - Impact Assessment on: Commission Regulation on the Application of Article 101(3) to Categories of Vertical Agreements and Concerted practices**

**(draft version of 18 December 2009)**

### **(A) Context**

Treaty article 101(3) allows agreements which restrict competition on condition that they generate and transfer to consumers a sufficient amount of benefits. The undertakings concerned have to determine whether these conditions are likely to be fulfilled on the basis of individual self-assessments. They may, however, benefit from regulations exempting whole categories of agreements such as those defined by Commission Regulation 2790/1999 and the accompanying guidelines (Commission Notice of 13/10/2000). As these are both set to expire on 31 May 2010, the Commission is considering which changes may be required.

### **(B) Overall assessment**

**While the report in general provides a clear presentation of the changes proposed, the Board is of the view that a number of improvements are needed to increase the overall quality of the analysis. In particular, more evidence needs to be provided to clarify the nature and the magnitude of the problems identified and the reasons why this initiative focuses on two specific issues (buyers' market power and internet sales) while other issues are not considered as problematic. In addition, the report should strengthen the analysis of impacts on consumers, employment and compliance costs. These improvements would allow a more informed assessment of the necessity and proportionality of the preferred policy options.**

### **(C) Main recommendations for improvements**

**(1) Provide greater clarity and stronger evidence on the nature and magnitude of the problems identified.** The report should make greater use of available evidence (case law, market concentration data, EU and Member States enforcement/case statistics, sector inquiry and other review findings etc.), to substantiate further the argument that vertical agreements with buyers holding more than a 30% market share pose a risk for consumer

welfare beyond the case of the retail sector currently presented. In this context, the choice of 30% as the relevant value for the proposed threshold should also be explained. The report should also discuss in greater detail the evidence that – below the 30% threshold - brick-and-mortar requirements in selective distribution agreements do not have anti-competitive effects or are necessary to deliver to consumers a fair share of the positive net benefits generated. In doing so, the report should provide a clearer differentiation of the interests of suppliers/producers and consumers in the solution of the internet "free-riding" problem, and provide examples.

**(2) Better define the scope of the initiative.** The report should better explain the reason why the analysis is limited to possible changes in two specific areas (i.e. buyers' market power and internet sales in the context of exclusive or selective distribution agreements), and why other issues are not considered to be problematic (for instance the continued existence of hardcore restrictions in an effects-based approach increasingly relying on market power thresholds). In this context, other available high level options could be briefly discussed (such as abandoning the regulation while preserving the guidelines). Finally, in the context of the broader "digital agenda", the report should make clear how the issues addressed here on internet distribution relate to the full set of issues relevant for the development of (cross-border) internet commerce.

**(3) Strengthen several aspects of the analysis of impacts.** The report should provide further information on the likely compliance costs of the different options, relying on the existing experience to provide broad orders of magnitude and providing examples of the implications that the choice of the reference markets (downstream vs. upstream) would have for the calculation of the proposed buyer's power threshold. The report should also make a greater effort to assess the impact of the proposed options on consumers and employment and discuss what impacts this initiative will have on the proposed changes to the competition framework applicable to the motor vehicle sector. Finally, to illustrate better the impact of online sales for exclusive distribution arrangements, the report could provide examples of what would constitute active or passive sales online (how, for instance, are search engines treated?).

*Some more technical comments have been transmitted directly to the author DG and are expected to be incorporated in the final version of the impact assessment report.*

#### **(D) Procedure and presentation**

A table providing a qualitative summary assessment of the impact of the various options for the different stakeholders should be added. The report should also clarify the extent to which the preferred option for buyers' market power has been subject to consultation. The provisions on monitoring and evaluation should be strengthened with a clear indication of when an evaluation of the full framework governing vertical restraints will be carried out. This should specifically include an analysis of the appropriateness of the level of the market threshold and of the outcome of the proposed inclusion of the vehicle industry under the (revised) general framework for vertical restraints. Finally, an annex could also provide more extensive background on the role of block exemption regulations within the framework of the application of Treaty Art. 101, clarifying the different responsibilities and enforcement procedures (who initiates the case, who has the burden of proof etc.).

<b>(E) IAB scrutiny process</b>	
Reference number	2009/COMP/011
External expertise used	No
Date of Board Meeting	27 January 2010